the right of condemnation where there has been a *bonâ fide* transfer to neutral ownership.[17]

If an appeal has not been seasonably taken, the only remaining possibility of relief is through diplomatic channels, the owners having lost all property in the *res*.[18] If the Department of State should see fit[19] to make a diplomatic claim in this case, based on the rule of law applied rather than on questions of fact, there is no reason why it should not do so. It is commonly said that unless a case has been appealed to the highest local courts, a state will not maintain a diplomatic claim.[20] This, however, is not literally true. The only objection to diplomatic claims before remedy has been sought in the highest courts is that the channels of diplomacy will be clogged by claims for decisions which might well have been corrected on appeal. The rule ends where its reason does. Where the objectionable court action depends on an administrative decree of the foreign government, as in this case, nothing could conceivably be gained by an appeal, and the aid of diplomacy may at once be invoked.[21]

THE EFFECT OF A NATIONAL BANK'S PURCHASE OF STOCK IN A BUILDING CORPORATION. — A case of importance, involving the powers of national banks, has recently been decided by the Supreme Court of Tennessee. In *Fourth National Bank of Nashville* v. *Stahlman*, 178 S. W. 942, the bank bought shares of stock in a building corporation as part of a transaction in which it leased banking quarters in the building to be erected. The promoter of the corporation contracted to purchase from the bank at a later date the stock thus acquired by it, and deposited security for his performance. When suit was brought on his promise, he defended on the ground that the acts of the bank were *ultra vires* and the transaction void. Thus was presented a twofold problem: whether the transaction was *ultra vires*, and whether the authority of the bank was subject to collateral attack. The court held that the transaction was *intra vires*, and intimated that in any event the authority of the bank could not be questioned collaterally.

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[17] Mr. Marcy, Secretary of State, to Mr. Mason, Feb. 19, 1856; cited in 7 MOORE, DIGEST OF INTERNATIONAL LAW, pp. 416–417. Clunet speaks of a protest by the American government, August 5, 1915, the day after the condemnation of the Dacia was announced. 42 Clunet, p. 502.

[18] "The sentence of a foreign court *of competent jurisdiction*, condemning a neutral vessel taken in war, as prize, is binding and conclusive on all the world." Dobree *v.* Napier, 2 Bing. (N. C.) 781, 795; Hughes *v.* Cornelius, Sir T. Raymond, 473. The sentence of a foreign court of admiralty binds the property on which it acts though that sentence is made under a decree subversive of the law of nations. This principle was applied to a condemnation under the Milan decree in the Napoleonic wars. Williams *v.* Armroyd, 7 Cranch 423 (1813). Other citations may be found in 7 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 1242–1243.

[19] The prosecution of such claims by the government is a matter of discretion, not of duty. See Gray *v.* United States, 21 Ct. Cl. 340, 392; 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 973, 974, 978, 995, 997.

[20] See 6 MOORE, DIGEST OF INTERNATIONAL LAW, § 987, citing numerous authorities.

[21] For a variety of cases showing that "a claimant is not required to exhaust justice where there is no justice to exhaust," — where an appeal would be futile, — see 6 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 988–992, incl.

On this latter point of collateral attack the decisions of the United States Supreme Court — federal decisions, of course, control on problems arising under the National Bank Act — are rather confusing. While no such rule is enunciated, the cases are not inconsistent with a doctrine that the *ultra vires* transactions are utterly void when made the basis of suit to charge the bank with liability, but when the bank seeks to enforce advantages obtained through such transactions, they are valid unless questioned by the government.[1] The leading case sustaining a bank's defense of *ultra vires* is that of *California Bank* v. *Kennedy*,[2] in which the bank was discharged from liability on the stock of an insolvent corporation which it held outside its authority; on the other hand, in *National Bank* v. *Matthews*,[3] the bank was allowed to foreclose on a mortgage entered into *ultra vires*. Perhaps the explanation of the cases may be found in the fact that the decision of *McCormick* v. *Market Bank*,[4] the first of the cases relieving the banks from liability, was handed down by Mr. Justice Gray, who had written the opinion in *Central Transportation Co.* v. *Pullman Car Co.*[5] This latter case, in which no mention was made of the earlier bank rulings *contra*, established the federal doctrine that an *ultra vires* act has no corporate significance whatsoever. Later, in *McCormick* v. *Market Bank*, if this rule was to be applied to national banks, it became necessary to explain the earlier decisions, and the distinction between "an abuse of a legal power" and "an attempt to exercise a power expressly prohibited by statute" was formulated.[6] But the distinction between buying stock, for which no authority is granted in the National Bank Act, as being "entirely outside the powers conferred on the bank," and securing a present loan by a real estate mortgage, when the statute authorizes such security only for debts previously contracted,[7] as "incidental to the exercise of powers conferred upon the bank," [8] is not satisfactory, nor

[1] In the following cases banks were allowed to enforce or retain advantages arising from such transactions: Gold-Mining Co. *v.* National Bank, 96 U. S. 640; National Bank *v.* Matthews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99; Reynolds *v.* National Bank, 112 U. S. 405; Fortier *v.* National Bank, 112 U. S. 439, 451; National Bank *v.* Gadsden, 191 U. S. 451; Kerfoot *v.* Farmers' & Merchants' Bank, 218 U. S. 281.

The defense of the bank was upheld in: McCormick *v.* Market Bank, 165 U. S. 538; California Bank *v.* Kennedy, 167 U. S. 362; National Bank *v.* Hawkins, 174 U. S. 364; National Bank *v.* Converse, 200 U. S. 425.

But in a Circuit Court of Appeals case, the bank, through its receiver, was denied the defense of *ultra vires;* though the case also went on the ground that the bank's authority was not exceeded. Brown *v.* Schleier, 118 Fed. 981. And a bank cannot both disclaim liability and reap the benefit of the contract. National Bank *v.* Townsend, 139 U. S. 67.

[2] See n. 1, *supra.*

[3] *Ibid.*

[4] *Ibid.*

[5] 139 U. S. 24.

[6] See 165 U. S. 538, 553. REV. STAT., § 5136 (7), U. S. COMP. STAT., 1913, § 9661 (7), reads: "But no association shall transact any business, except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking." The association had in this case negotiated the lease of banking premises before such time. The lease was held to be *ultra vires* and absolutely void.

[7] REV. STAT., § 5137 (2), U. S. COMP. STAT., 1913, § 9674 (2).

[8] Justice Gray's distinction was thus re-phrased in California Bank *v.* Kennedy, 167 U. S. 362, 370.

does it explain why in the one case the *ultra vires* act of the bank should be void and in the other voidable by the government only. This distinction is even less convincing when the circumstances of the purchase of stock are such as to lead a dissenting minority to consider the acquisition incidental to the banking powers and *intra vires*.[9] A reluctance to upset titles [10] will not explain why the security of a real estate mortgage must be enforced; and the interpretation of the Act to the effect that "the impending danger of a judgment of ouster and dissolution was the check, and none other, contemplated by Congress," [11] seems as applicable to one type of case as to the other.

But one is spared the difficulty of applying the Supreme Court's distinctions to the principal case [12] if the stock purchase in question was *intra vires*. National banks are authorized by the Act to "hold such real estate as is necessary for its immediate accommodation in the transaction of its business." [13] Under this provision it has been held that a bank may lease a building site for 99 years and contract to build thereon, at a minimum cost of $100,000, a structure of not less than four stories, only a part of which is for its own accommodation.[14] Similarly a bank may build on its own land a six story building, renting the space it does not itself occupy.[15] For the Act is not to be construed as prohibiting a businesslike disposition of banking premises. The policy against permitting a bank to speculate or tie up its capital in real estate cannot be invoked to force uneconomical methods of business upon it. But though a bank may erect a building larger than is needed for its own accommodation, may it purchase stock in an independent corporation organized for such purpose?

No authority is given national banks to purchase corporation stock and the omission is held to be a prohibition.[16] It is considered an improper investment of its funds. Yet there is no disability inherent in the ownership of stock, for a bank may lawfully acquire stock by foreclosure on security [17] or in settlement of a claim.[18] The prohibition is against

[9] In National Bank *v.* Converse, 200 U. S. 425, the bank, as creditor of a failing corporation, participated in the organization of a new corporation and exchanged its claim against the old for stock in the new. Upon the failure of the new corporation, an action was instituted against the bank as stockholder on a statutory double liability. But the acquisition of the stock by the bank was held to be *ultra vires* and utterly void, and the bank was relieved from the liability. Compare also cases holding that a bank can acquire and pass title to its own stock under circumstances expressly prohibited in the Bank Act. National Bank *v.* Stewart, 107 U. S. 676; Lantry *v.* Wallace, 182 U. S. 536.

[10] See Kerfoot *v.* Farmers' & Merchants' Bank, 218 U. S. 281, 287.

[11] See National Bank *v.* Matthews, 98 U. S. 621, 629.

[12] It is a subject for speculation whether the transaction in the principal case, if considered *ultra vires*, would be regarded as the mere "abuse of a legal power" to acquire a business location, or "entirely outside the powers conferred upon the bank," because a purchase of stock.

[13] Rev. Stat., § 5137 (1), U. S. Comp. Stat., 1913, § 9674 (1).

[14] Brown *v.* Schleier, 118 Fed. 981.

[15] Wingert *v.* National Bank, 175 Fed. 739.

[16] See California Bank *v.* Kennedy, 167 U. S. 362, 366; National Bank *v.* Converse, 200 U. S. 425, 438.

[17] National Bank *v.* New England Electrical Works, 73 N. H. 465, 62 Atl. 971; McBoyle *v.* National Bank, 162 Cal. 277, 122 Pac. 458.

[18] National Bank *v.* National Exchange Bank, 92 U. S. 122; Tourtelot *v.* Whithed. 9 N. D. 467, 84 N. W. 8.

speculation or investment in stock. Where the investment in a building corporation is a reasonable and *bonâ fide* method of acquiring banking quarters, it seems difficult not to support the transaction as an exercise of implied incidental powers. Although in a like manner other corporations are prohibited from investing in stock, it has been held that a railroad company may purchase the majority interest in a corporation engaged in business which the railroad is authorized to transact,[19] and that a cloth manufacturing and bleaching company may buy stock in a corporation producing the dyes used in its manufacturing process.[20] Where a corporation may achieve a purpose directly, the power to perform indirectly would seem reasonably incidental, unless some principle of public policy were violated by the method of accomplishment.

It is true that the purchase of less than a controlling interest may be objectionable on the ground that the funds of the bank are thus placed beyond the control of its directors. On the other hand, the situation in the principal case so closely resembles a loan that the transaction can hardly be open to criticism on mere grounds of policy. For the bank obtained from the promoter, at the time of its purchase of the stock, a promise to buy at par value, and received security for the performance of this obligation.

THE TORT LIABILITY OF A CONTRACTOR FOR NEGLIGENT WORK ON COUNTY ROADS. — It has been a great matter of litigation how far public bodies are liable in tort with respect to their duty to maintain and repair highways. Whatever answer the courts may give to that question, the tort liability of individuals who are prosecuting the public work should be sharply distinguished. A recent case in Kentucky, however, lays down the rule that a highway contractor is not liable for positive misfeasance, because his employer, the county, is immune from suit. *Ockerman* v. *Woodward*, 178 S. W. 1100.

In England, under the common law, the duty to repair roads was imposed on the parish,[1] the duty to repair bridges on the county.[2] For the failure to perform this obligation, an indictment lay against the inhabitants of the parish or the county.[3] Yet an individual who suffered special injury through the defective condition of the bridge out of repair was denied recovery against the county in the leading case of *Russell* v. *Men of Devon*.[4] While the principle upon which the case is to be rested has received frequent and varied treatment, it has been generally followed in England and in this country, where either a county, parish, or town was by statute or common law under a duty to repair a bridge or high-

[19] State *v.* Missouri, etc. Ry. Co., 237 Mo. 338, 141 S. W. 643. But see *contra*, People *v.* Pullman Car Co., 175 Ill. 125, 159, 51 N. E. 664, 676.

[20] Joseph Bancroft & Sons Co. *v.* Bloede, 106 Fed. 396.

[1] COM. DIG., tit. Chimin A 4, vol. II, 398; 1 BL. COM., 357.

[2] COM. DIG., *ibid.*, B 2, vol. II, 399; 1 BL. COM., 357; 2 COKE, INST., 700.

[3] COM. DIG., tit. Chimin A 4, B 3; 1 BL. COM., 357; King *v.* Inhabitants of Devon, 14 East 477.

[4] 2 D. & E. 667.